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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SUE SUTER, et al.,

Petitioners,

v.

ARTIST M., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION, THE CHICAGO COUNCIL OF LAWYERS, THE CHILD CARE ASSOCIATION OF ILLINOIS, VOICES FOR ILLINOIS CHILDREN, ILLINOIS ACTION FOR CHILDREN, THE CITIZEN'S COMMITTEE ON THE JUVENILE COURT, THE ILLINOIS CAUCUS FOR FOSTER CHILDREN, THE LEAGUE OF WOMEN VOTERS OF ILLINOIS, BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST, THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE MANDEL LEGAL AID CLINIC OF THE UNIVERSITY OF CHICAGO, NORTHWESTERN UNIVERSITY LEGAL CLINIC, THE CLASS MEMBERS IN *NORMAN v. SUTER*, No. 89 C 1624 (N.D. Ill.), AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF THE AMICI CURIAE

The Amici include state and local bar associations, child welfare and advocacy groups, legal advocacy organizations, and plaintiffs in other Illinois litigation brought under 42 U.S.C. § 1983 to enforce the Adoption Assistance and Child Welfare Act of 1980 ("the AACWA"). These diverse groups share a concern about the severe and irreparable harm to Illinois children due to Illinois' failure to enable children to remain home, be reunited with their families, or secure other permanent homes. These groups also share the view that judicial enforcement of the AACWA, and in particular, the "reasonable efforts" requirement is necessary to prevent future harm to Illinois children. They file this amici brief with the written consent of the parties.*

1. State and Local Bar Associations.

The Illinois State Bar Association ("ISBA"), founded in 1877, is a voluntary association of 33,000 attorneys committed to the proper and fair administration of justice for all persons in the state of Illinois. The ISBA Standing Committee on Juvenile Justice, established in 1980 and comprised of judges, states' attorneys, public defenders and private attorneys, reviews and recommends legislation and is active in educating the bar and the public in juvenile issues. ISBA President Thomas A. Clancy has declared 1991-1992 to be the "Year of the Child" during which ISBA will focus member and public attention on children's issues.

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* Amici have filed the letters granting consent with the Clerk of this Court.

The Chicago Council of Lawyers is a 1400-member non-profit, public interest bar association whose activities are designed to improve the system of justice. Formed in 1969, the Council is particularly concerned with honest judicial evaluations, high standards for legal ethics, improvement of the criminal justice system, legal services for the poor and fairness and effectiveness of the courts. The Council's Juvenile Law Committee has been active in seeking improvements in juvenile justice in Cook County, Illinois.

2. Child Welfare, Child Advocacy and Other Civic Organizations.

The Child Care Association of Illinois is comprised of 66 voluntary not-for-profit child welfare agencies delivering a full continuum of children's services throughout the State of Illinois, including preventive and reunification services.

Voices for Illinois Children is a statewide child advocacy organization governed by civic, business and community leaders whose mission is to improve the lives of Illinois children. The organization develops and promotes strategies for early intervention, health care, and child welfare programs.

Illinois Action for Children ("IAFC"), founded in 1977, is a statewide, citizen-based child advocacy organization, promoting improvements and change in the child welfare and juvenile court to enable every child to secure a safe, nurturing and permanent family of his or her own.

The Citizen's Committee on the Juvenile Court is a 29-member volunteer panel, appointed by the Chief Judge of the Circuit Court of Cook County, which serves in an

advisory capacity to various judicial and administrative offices in the juvenile justice system.

The Illinois Caucus for Foster Children, Inc. is a state-wide coalition of individuals and organizations, including many foster parents, concerned about the quality of care of more than 23,000 Illinois children currently in foster care.

The League of Women Voters of Illinois is a nonpartisan organization that works to promote political responsibility through the informed and active participation of citizens in government. The League has a long history of advocacy on behalf of children, including support of improved services of Illinois state agencies serving children and their families.

3. **Legal Advocacy Groups.**

Business and Professional People for the Public Interest ("BPI") was founded in 1969 for the purpose of providing representation to groups and individuals whose rights are endangered.

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. ("Lawyers' Committee") was founded in 1969 for the purpose of involving private attorneys in an effort to assure civil rights to all persons in the Chicago area.

The Mandel Legal Aid Clinic of the University of Chicago Law School represents poor people, including mothers and children, in virtually all federal and state forums in Illinois.

Northwestern University Legal Clinic is an in-house clinic which represents indigent clients in a variety of pro-

ceedings; the clinic's primary focus is on the representation of families and children both in and outside of the Juvenile Court of Cook County.

4. Plaintiff Class Members in *Norman v. Suter*.

The plaintiff class in *Norman v. Suter*, No. 89 C 1624 (N.D. Ill.) includes thousands of Illinois parents whose children were removed from or maintained outside of their custody by the Illinois Department of Children and Family Services ("DCFS") because of their poverty but for whom the agency made no "reasonable efforts" to keep their family together.

SUMMARY OF ARGUMENT

The Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), Pub. L. 96-272, 94 Stat. 501 (1980), codified at 42 U.S.C. §§ 671 *et seq.* restructured the federal foster care program Congress had created as part of Title IV-A of the Social Security Act (the "Act") in 1961. 42 U.S.C. § 608 (1976). The restructured foster care program, Title IV-E of the Act, like the predecessor IV-A foster care program, requires states, as a condition of federal funding for their IV-E foster care programs, to ensure that these programs comply with federal statutory "state plan" requirements. 42 U.S.C. § 671(a). *See Miller v. Youakim*, 459 U.S. 125 (1979). This case concerns the judicial enforceability of a Title IV-E state plan requirement that was central to Congress' efforts to restructure the Act's foster care program, which Congress found seriously deficient and sought to reform.

For states participating in the program, including Illinois, Sections 471(a)(3) and (15) of the Act, 42 U.S.C.

§§ 671(a)(3) and (15) ("Sections 671(a)(3) and (15)"), require that a "state plan" be "in effect" which provides that:

> in each case, reasonable efforts will be made, (A) prior to the placement of a child in foster care to prevent or eliminate the need for removal of a child from the home and (B) to make it possible for the child to return to his own home.

Section 472(a)(1) of the Act, 42 U.S.C. § 672(a)(1) ("Section 672(a)(1)"), also requires, in order for a child to be eligible for federal foster care payments under Title IV-E, that a state court judge must first make a "judicial determination" that the state child welfare agency has made "reasonable efforts" to prevent or eliminate the need to place the child in foster care.

The principal question in this case is whether the direct beneficiaries of the Title IV-E foster care program may judicially enforce, in a federal court suit under 42 U.S.C. § 1983, their right to have "in effect" a "state plan" providing for the "reasonable efforts" that Sections 671(a)(3) and (15) mandate. The court of appeals determined that Sections 671(a)(3) and (15) are judicially enforceable in a Section 1983 suit, and amici here support the many arguments of respondents and their other amici urging affirmance of that judgment. Amici here supplement those arguments by a discussion of the evidence of DCFS' systemic non-compliance with Sections 671(a)(3) and (15) and the effects of such non-compliance on Illinois children and on the Illinois courts.

A. The principal goal of AACWA was to eliminate unnecessary use of foster care. The principal means by which Congress effectuated this goal was to "restructure" the then-existing Aid to Families with Dependent Children—Foster Care ("AFDC-FC") program by requiring states,

as a condition of federal financial participation in Title IV-E foster care programs, to have "in effect" a "state plan" providing in each case for "reasonable efforts" to prevent the need for removal and to make it possible for the child to return home. S. Rep. No. 336, 96th Cong., 1st Sess. 1, 12 (1979).

B. Illinois does not have "in effect" a "state plan" that provides for the "reasonable efforts" mandated by Sections 671(a)(3) and (15). The district court's findings in this case, findings in other litigation, and numerous reports by committees of the organized bar and child welfare experts in Illinois all document this conclusion.

C. The systemic failure of Illinois to have in effect a state plan providing such "reasonable efforts" causes children remaining at home and foster children in Illinois substantial and irreparable injury.

D. Because DCFS has failed to comply with Sections 671(a)(3) and (15), the Illinois state juvenile courts cannot satisfactorily comply with their own independent obligation under Section 672(a)(1): to make an informed judicial determination, before placing an individual child in foster care, that DCFS has made "reasonable efforts" to prevent such a placement.

E. Neither the Illinois state juvenile courts nor the Secretary is capable of effectively enforcing—and they do not in fact enforce—the AACWA requirement that the state welfare agency administering the Title IV-E program put "in effect" a "state plan" that provides in each case for "reasonable efforts" to prevent removal and enable children to return home.

ARGUMENT

I.

THE AACWA REQUIRES ILLINOIS TO HAVE IN EFFECT A STATE PLAN PROVIDING FOR "REASONABLE EFFORTS" TO PREVENT PLACEMENT OF CHILDREN IN FOSTER CARE AND TO ENABLE CHILDREN PLACED IN FOSTER CARE TO RETURN TO THEIR OWN HOMES.

Congress enacted the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), Pub. L. No. 96-272, 94 Stat. 501, to effect a "major restructuring" of Social Security Act programs for the care of children removed from their own homes. S. Rep. No. 336, 96th Cong., 1st Sess. 1 (1979). One important goal of the new act was to "de-emphasize the use of foster care", *id.* at 12, by increasing prevention efforts and moving children out of foster care by reuniting them with their own families when feasible or placing them in adoptive homes. *Id.* at 10. The statutory emphasis on foster care prevention and family reunification efforts followed the testimony or remarks of numerous witnesses or legislators at several hearings Congress conducted between 1975 and 1979 concerning the nation's child welfare system, particularly as it affected foster children. *Joint Hearings Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare and the Subcomm. on Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975) ("1975 Joint Hearings"); *Hearings on H.R. 7200 Before the Subcomm. on Public Assistance of the Senate Finance Comm.*, 95th Cong., 1st Sess. (1977) ("1977 Senate Hearings"); *Hearings Before the Subcomm. on Public Assistance & Unemployment Compensation of the Comm. on House Ways and Means*, 95th Cong., 1st Sess. (1977); *Hearings on H.R. 3434 Before the Subcomm. on Public Assistance of the Senate Finance Comm.*, 96th Cong., 1st

Sess. (1979) ("1979 Senate Hearings"). These witnesses testified to alarming foster care abuses, including thousands of children placed in foster care and set adrift from placement to placement when minimal efforts might have enabled them to remain or return home. *See, e.g., 1979 Senate Hearings* at 56 (remarks of Sen. Cranston); *1977 Senate Hearings* at 106 (testimony of Secretary Califano); *1975 Joint Hearings* at 10 (testimony of Dr. Albert Solnit); *1975 Joint Hearings* at 75 (testimony of Dr. David Fanshel).

Congress sought to achieve the type of restructuring it desired by requiring states participating in the Title IV-E foster care program to have "in effect" a "state plan" that provided both for efforts to prevent placement of children in foster care ("foster care prevention efforts"), or if placement of a particular child was necessary, efforts to reunite the child with his family ("family reunification efforts"). 42 U.S.C. §§ 671(a)(3) and (15).

In Section 672(a)(1), Congress also provided that before a child can be placed in foster care under the Title IV-E program, there must be a state court judicial determination that "reasonable efforts of the type described in section 671(a)(15) . . . have been made." 42 U.S.C. § 672(a)(1).

In 1974, 1,864 Illinois children were reported to the DCFS as abused or neglected. By 1988, that number had increased to 94,098. Brief of Defendant-Appellant Johnson (DCFS Director) at 18, *Bates v. Johnson*, 901 F.2d 1424 (7th Cir. 1990) (No. 89-3095).[1] Over 20,000 children are

[1] The relevant section of this brief, the relevant sections of the *B.H.* Panel Report, *infra* at 9, the Chicago Bar Association Report, *infra* at 15-16, the *Norman* Consent Decree and Chicago Tribune article concerning it, *infra* p. 13, the relevant DCFS Rule and Procedure Manual sections, *infra* pp. 10, 22, 24, the AFDC Policy

(Footnote continued on following page)

currently in DCFS' custody. Final Consolidated Report of Rule 706 Panel of Experts at 2, *B.H. v. Suter*, 88 C 5599 (N.D. Ill., Oct. 26, 1990) ("Expert Panel Report").[2] These children and children remaining home who are at risk of placement in foster care are the ones for whom an Illinois state plan in compliance with Sections 671(a)(3) and (15) is essential to avoid resort to foster care when initial or continued placement is unnecessary or inappropriate.

II.

DCFS SYSTEMICALLY VIOLATES THE AACWA BY FAILING TO MAKE FOSTER CARE PREVENTION AND FAMILY REUNIFICATION EFFORTS FOR CHILDREN, THEREBY CAUSING THE CHILDREN SUBSTANTIAL AND IRREPARABLE HARM.

Illinois has vested exclusive responsibility for initiating foster care prevention and family reunification efforts in DCFS "follow-up" caseworkers. Op. Cert. App. 11-13 (District Court Findings Nos. 4-8). At the same time, however, Illinois has failed to develop a system of providing timely follow-up caseworker assignments to substantial

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[1] *continued*
Manual sections, *infra* p. 10 and the Mitchell case plan and order, *infra* p. 14, have all been lodged with the Clerk of this Court and served upon the parties to this litigation and Petitioners' amici.

[2] In *B. H. v. Suter*, a class of children in foster care in Illinois has alleged violation of their constitutional rights to minimally adequate treatment as well as violation of several provisions of the AACWA. After denying a motion to dismiss, *B. H. v. Johnson*, 715 F. Supp. 1387 (N.D.Ill. 1989), the district court on August 31, 1990 appointed a panel of experts to review DCFS' treatment of children in ten areas. The panel submitted its 500-page report on October 26, 1990.

numbers of plaintiff children. This systemic failure violates the clear mandate of Sections 671(a)(3) and (15) for a state plan "in effect" providing for "reasonable efforts in each case." As a result, Illinois children suffer in precisely the ways Congress sought to prevent when it enacted the AACWA.[3] Illinois' failure to make the reasonable efforts mandated by Congress is manifest both in the record of the case and the public record established in other matters.

A. The *Artist M.* Record.

Petitioners do not challenge in this Court the district court's findings of fact that accompanied the preliminary injunction order they seek to overturn. These findings of fact tell the story of DCFS' failure to have in effect a plan for the provision of reasonable efforts for a substantial number of children in foster care in Illinois. Op. Cert. App. 4-25.

The district court found, in particular, that "[u]nless and until DCFS has assigned a caseworker [to a child's case], *no* services can be or are in fact provided to plaintiffs

[3] As our fellow amici, the American Association for the Protection of Children *et al.* show in detail, long-term placement in foster care (often in successive foster care placements) for children who could remain at home or promptly return home is harmful to such children, and very costly to the state. A.A.P.C. Br. § II. In Illinois, for example, it costs, per month, at least $263 to maintain a baby in foster care, $325 to care for a teenager and nearly $500 to care for children in emergency foster homes. Illinois Department of Children and Family Services, *Rules and Procedures Manual* App. E-P359(1E) (July 1, 1990). Institutional placement is, of course, substantially more expensive. By contrast, children at home receiving Aid to Families with Dependent Children ("AFDC") benefits under Title IV-A of the Act in Illinois received no more than $102 per child per month. Illinois Department of Public Aid, *AFDC Policy Manual* PR 615, Attachment I(2) (January 1, 1991).

or their families." *Id.* at 13 (Findings Nos. 9, 11) (emphasis added). Accompanying that central finding were numerous additional findings attesting to: "significant delays . . . in assigning caseworkers at the outset of cases," *id.* at 19 (Finding No. 21); "gaps [in assignment of caseworkers] created when caseworkers resigned, transferred, were fired or took a leave of absence," *id.* at 24 (Finding No. 26); "paper assignments . . . [of] a caseworker in name only," *id.* at 17 (Finding No. 19); no effort "to expedite the assignment of caseworkers capable of delivering family preservation, family reunification and other services to children and their families," *id.* at 17 (Finding No. 18); substantial "harm . . . befalls children for whom such services are not promptly provided, including the continued indefinite separation from their families, *id.* at 14 (Finding No. 10).[4]

Since the service delivery system DCFS itself has established requires the assignment of caseworkers to a case for *any* services to be provided to the children for whom that case was established, and since the unchallenged fact is that many cases are not assigned to *any* caseworker for weeks or even months, *id.* at 15 (Finding No. 13), it necessarily follows that, as the district court found, Illinois children go for extended periods without *any* efforts—much less reasonable ones—to prevent foster care placement and reunite families that Congress intended be made on their behalf. 42 U.S.C. §§ 671(a)(3) and (15). *See* Op. Cert. App. 4-25 (Findings Nos. 9, 10, 13, 15, 16).

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[4] The Petitioners argue here, as they did in the lower courts, that DCFS independently took significant steps under a "Reorganization Plan" to expedite case assignment. Pet. Br. pp. 5-6. The district court found otherwise. Pet. App. 51a-58a (Preliminary Injunction Order, March 2, 1990).

B. *Norman v. Johnson*.

Norman v. Johnson, 739 F. Supp. 1182 (N.D. Ill. 1990), is another federal class action suit brought pursuant to 42 U.S.C. § 1983. Like *Artist M.*, the *Norman* findings also demonstrate DCFS' systemic failure to provide foster care prevention and family reunification efforts on behalf of children eligible for them.

Plaintiffs in *Norman* were a class of homeless and other impoverished parents who sued the DCFS director to secure their rights under Section 671(a)(15). *Norman*, 739 F. Supp. at 1182. They alleged, in particular, that far from providing the "reasonable efforts" that AACWA anticipated, DCFS had established a "Catch 22" policy, applied throughout the state to class members and their children, that made it difficult or impossible for foster children taken from homeless or other impoverished parents ever to be reunited with their parents. *Id.* at 1194 (Finding No. 9). Under the challenged policy, DCFS would take children from their parental home because the parents were homeless or too poor to provide "adequate" shelter for them. *Id.* at 1194 (Finding No. 7). In order to have children returned home, however, the parents would need to secure housing and other subsistence first. *Id.* (Finding No. 9). The family, however, could not meet this condition because they would not qualify for the cash and housing assistance they needed in order to afford such housing until the children were actually returned home. *Id.* at 1194 (Finding No. 9). The district court denied the Director's motion to dismiss, finding 42 U.S.C. § 671(a)(15) judicially enforceable.

Contrary to the Petitioners' representation, Pet. Br. at 38, *Norman* did *not* raise claims having to do with the state's failure to make "reasonable efforts" in purely

"individual cases." The injunction the named plaintiffs secured was predicated on the claim of the plaintiff class that DCFS had established a *system-wide* policy that transgressed its obligation to have "in effect" a state plan providing "reasonable efforts" to reunite their families.[5] Most relevant here, the district court's ruling was predicated on several findings of fact, entered after five days of hearings before a magistrate, including: 1) The DCFS investigators (i.e. the persons authorized to remove children from their homes) are not trained as to services that may be available and do not in practice make an assessment of whether there are services available that would avoid the need to remove the children from their parents. *Id.* at 1193 (Finding No. 4). 2) If a report (of abuse or neglect) is found to be based on credible evidence, it takes DCFS "two to three weeks" before a follow-up caseworker is assigned. *Id.* at 1193 (Finding No. 6). These findings establish that, in many cases where the causes for removal of children could be remedied and children returned home quickly, no trained person is available promptly to work with the child and family. The long-term effect of this failure can be devastating for children.

Joann Mitchell, one of the named plaintiffs in *Norman*, suffered the combined effects of the state's failure to ensure that caseworkers are assigned on a prompt and continuous basis—the subject of the children's challenge in

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[5] Following the injunction, DCFS settled *Norman* by establishing extensive "reasonable efforts" policies and a broad-based assistance program for thousands of impoverished families. Consent Decree, 89 C 1624 (Hart, J., March 28, 1991). After settlement, the Director acknowledged that as many as 2500 Illinois families per year could avert placement or be reunited as a result of the agreement. Rob Karwath, "State Agency Hit With Suit," *Chicago Tribune*, Feb. 28, 1989 at 2.

this case—and the "Catch 22" treatment of impoverished families, which was the subject of *Norman*. DCFS took temporary custody of her three children (Nicole, age 11, Christian, age 10, and Dominick, age 5) in 1985 based on an informant's report—which the district court later found may have been false—that she had abandoned the children. *Id.* at 1200. (Finding 57). Ms. Mitchell made repeated inquiries to DCFS regarding her children's whereabouts in the weeks after they were removed. Nonetheless, it took her seven weeks to determine that they had been placed in foster care. *Id.* (Finding 60). The *Norman* record offers no evidence that DCFS made any efforts during this period to reunify the Mitchell family, much less that DCFS had sought to keep the Mitchell children with their mother in the first instance. *Id.* at 1201 (Findings 62-69). The state juvenile court did order the Mitchell children returned to their mother in 1986, but no DCFS caseworker took any action to comply with that order. *Id.* at 1201 (Finding No. 61). Thereafter, DCFS regained temporary legal custody of the children, but offered no services to make possible family reunification. In December, 1988, Christian, then eight years old, was abused in the foster home in which he had been placed. *Id.* at 1202 (Finding No. 71). Nonetheless, only in June, 1989, after the federal district court entered the injunction in *Norman*, did DCFS caseworkers take any steps to provide services to the Mitchell family to make possible the reunification of mother and children. Joann Mitchell, Client Service Plan (June 20, 1990). DCFS finally returned the Mitchell children to their mother under an "Order of Protective Supervision" on November 21, 1990. *In re Mitchell*, No. 86 J 7356-8, Order (Ill. Cir. Ct., Nov. 21, 1990). The children had been in foster care for five years. Timely and continuous assignment of a caseworker to the Mitchell family, coupled with the provision of preventative and

reunification services to the family, might have prevented precisely the type of destructive results Congress sought to prevent when it enacted the AACWA: the protracted separation of children from their mothers, the children's unnecessary placement in foster care, and (in the case of Christian) abuse in the foster care placement.

C. The Expert Panel Report In *B.H. v. Suter* And The Chicago Bar Association Report.

The October, 1990 Expert Panel Report in *B.H. v. Suter* found that DCFS' failure to "develop comprehensive individualized service plans for wards and their families contributes to foster care drift, failed placements and a failure to provide permanency for children." *B.H.* Panel Report at 11. The report noted that cases are "unattended and unassigned." *Id.* at 3. The report further documented that fewer than 50% of families with "founded" abuse or neglect reports receive *any* services to prevent placement of their children. *Id.* at 11. The long-term effect of these state defaults is that DCFS cannot move children into adoptive homes, since the lack of family assessments cripples the state's ability to free and place chiidren for adoption. *Id.* at App. J p. 8; *see also* discussion *infra* pp. 23-24.

Other evidence of the systemic failure to maintain a state plan for "reasonable efforts" appears in the 1989 report of the Chicago Bar Association's Special Committee to Study Juvenile Justice. Chicago Bar Association, *A Report to the President of the Chicago Bar Association* (1989) ("CBA Report"). This report, prepared by a broad-based group of lawyers, court administrators and social service agency directors after a year-long study, advanced numerous recommendations respecting the juvenile court system in Illinois. Notably, it recommended improved implementation of the "reasonable efforts" mandate by:

legal advocacy in juvenile court to enable troubled families to obtain services before their children are removed, identification of services which can prevent foster care placement but are often unavailable or underutilized, and legislative advocacy for additional funding for prevention and reunification services. These recommendations followed from the findings of the Report that the Illinois statute governing prevention and reunification efforts in Illinois is "largely ignored." *Id.* at 12. The Report also noted that DCFS' investigators do not view their function as offering services to families.[6] *Id.*

D. Children In Illinois Are Suffering Substantial And Irreparable Harm Due To Unnecessary Placement In Foster Care.

Our fellow amici, the American Association for the Protection of Children *et al.*, have documented the harm that befalls children in need of foster care prevention and family reunification services when those services are not provided. A.A.P.C. Br. § II. This harm—the harm that results from unnecessary and multiple foster care placements—is severe and irreparable. *Id.* Moreover, contrary to the Director's remarkable suggestion, the principle that foster care prevention and family reunification efforts should therefore be provided to children in need of them is not simply "one theory" among many as to appropriate foster

[6] The Report lamented the "high [financial] cost" of DCFS' failure to adequately ensure the delivery of the same services in compliance with the AACWA, referring to the significant differential between the cost to the state of caring for a child in foster care and helping support him if he remains in his own home. *CBA Report* at 13. *See* note 2 *supra*. Moreover, the Report stated, "there is the intangible cost of rupturing families that should be maintained." *CBA Report* at 13.

care policy. Pet. Br. at 21-25. *No* reputable child welfare professional and no state child welfare program administrator in the entire country disputes the importance of ensuring the systemic provision of such services if the country's foster care policy is to be humane, efficient, and economical. A.A.P.C. Br. at § II.

The harm to children that results from systemic failure to provide foster care prevention and family reunification efforts is documented with respect to Illinois foster children in particular. The Chapin Hall Center for Children at the University of Chicago, a national research center on children's policy issues, has conducted extensive research concerning children in the Illinois child welfare system. A recent study conducted under the Center's auspices demonstrates that the failure to make prompt reunification efforts *within the first weeks* of a child's placement in foster care, coupled with multiple foster care placements for the child in the initial months, substantially diminish the likelihood that the child will *ever* be reunited with his natural family. Robert M. Goerge, "The Reunification Process in Substitute Care," 64 *Soc. Serv. Rev.* 422 (Sept. 1990).

The Expert Panel Report in *B.H. v. Suter* offers further detailed evidence of the harm that befalls foster children in Illinois as a result of the state's failure to effectively implement a plan for the delivery of foster care prevention and family reunification services. In particular, the Report finds that over 80% of the youth in the DCFS shelter care system in Cook County, and the majority of all children in DCFS custody, have been in multiple out-of-home placements. *B.H.* Panel Report, App. D at 6, 12. Children are subjected to multiple short-term placements because of a shortage of out-of-home placement resources to meet their needs. *Id.*, App. D at 12. Such multiple

placements leave children with lasting emotional and developmental scars. *See* A.A.P.C. Br. at § II.

The court in *In re Ashley K.*, 212 Ill. App. 3d 849, 571 N.E.2d 905 (1st Dist. 1991), has also recently concluded that children in the Illinois foster care system routinely are denied the permanent placements Congress intended them to have. That court issued a scathing indictment of the Illinois child welfare system, noting repeatedly Illinois' failure to meet the requirements of the AACWA for the timely disposition of abused and neglected children's cases before the juvenile court:

> Ashley's story is the account of a helpless child caught in the quagmire of the bureaucratic maze which we mistakenly call our welfare system. . . There is no doubt that the DCFS and our juvenile court system are abysmal failures. There are reports that almost as many children are harmed as are benefitted by coming under their aegis.[7]

212 Ill. App. 3d at 873, 571 N.E.2d at 919.

In sum, the Illinois child welfare system today is one in which children drift from temporary placement to temporary placement, when minimal efforts would have enabled them to remain or return home or be freed for

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[7] Since Ashley's case concerned a challenge to the reunification of a family ordered by the trial court after a five-year delay, petitioners here improperly read the case as excusing reasonable efforts *ab initio*. Pet. Br. at 25-26. Far from excusing those efforts, however, the case dramatizes the effect on children in *delaying* reunification efforts as the child forms other attachments. Had the state maintained a system providing for reasonable efforts in a timely manner, and had it documented the parents' failure to cooperate in those efforts, Ashley might have become adoptable (as had been misleadingly promised to her foster parents). *See In re Ashley K.*, 212 Ill. App. 3d at 861, 571 N.E.2d at 907.

adoption. In enacting AACWA, Congress disapproved of just such a system, and through Sections 671(a)(3) and (15), among other provisions, sought to reform it.

III.

DCFS' SYSTEMIC FAILURE TO MAKE FOSTER CARE PREVENTION AND FAMILY REUNIFICATION EFFORTS FOR CHILDREN UNDER A LAWFUL STATE PLAN THAT IS "IN EFFECT" DEFEATS THE ABILITY OF THE ILLINOIS STATE COURTS TO FULFILL THEIR OWN INDEPENDENT OBLIGATION UNDER THE AACWA.

Petitioners acknowledge the mandatory nature of Sections 671(a)(3) and (15), but argue that the provisions of Section 672(a)(2) make the state courts the sole judicial officers authorized to interpret "reasonable efforts."

The obligation arising under Sections 671(a)(3) and (15), is distinct from that arising under Section 672(a)(1). The right secured by Sections 671(a)(3) and (15) is the right to enforce through Section 1983 the Act's requirement "that the state implement a *plan* that provides for reasonable efforts directed at preventing the removal of a child from home, or if the child is removed, to return the child to his family." Pet. App., at 11a (emphasis added). Hence the statute only vests in children a right to have the state comply with this requirement.[8] In contrast, Sec-

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[8] In our view, accordingly, if a child has not received any family reunification services in a particular instance due to a caseworker's error that is unrelated to the efficacy of the state's plan, Section 671(a)(15) is not implicated. There is no federally enforceable right under Section 671(a)(15) to challenge an agency decision to provide or not to provide a *particular* foster care prevention or family reunification service in an *individual* case, absent a claim that the failure to provide such service (or particular services) is the

(Footnote continued on following page)

tion 672(a)(1) secures a federal right to an individualized state court judicial determination, prior to placement of an *individual* child in foster care, that the state has made "reasonable efforts" to prevent such placement in his or her case.

The distinct federal rights secured by Sections 671(a)(3) and (15) and Section 672(a)(1) are complementary, however. As the American Bar Association, in its amicus brief supporting respondents, explains, without the state's implementation of a "state plan" that complies with Sections 671(a)(3) and (15), state courts cannot fulfill their independent responsibility under Section 672(a)(1) to provide the state judicial oversight of the prevention and reunification efforts in individual cases. *See* ABA Br. at § I. Illinois offers a paradigmatic illustration of this central point, which contradicts the Petitioners' mystifying suggestion, Pet. Br. at 24, that by enacting Section 672(a)(1), Congress indicated it did *not* intend Sections 671(a)(3) and (15) to be judicially enforceable.

In 1985, the Illinois legislature amended the Illinois Juvenile Court Act to incorporate into state law the same right that Section 672(a)(1) confers. Ill. Rev. Stat. ch. 37, § 703-6 (recodified by P.A. 85-601 as Ill. Rev. Stat. ch. 37 § 802-10, effective January 1, 1988). As amended, the

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[8] *continued*
result of an agency failure to have "in effect" a lawful state plan that complies with the AACWA. Sections 671(a)(3) and (15) thus anticipate only systemic challenges to agency policy and practice, not challenges to a caseworker's exercise of her discretion under a lawful state plan that is "in effect." This understanding of the statute decisively rebuts petitioners' contention (Pet. Br. at 38), flawed on numerous grounds, that declaring Section 671(a)(15) to be judicially enforceable will create a torrent of litigation under the provision.

Juvenile Court Act provides for the state court judicial determination of whether "reasonable efforts" have been made to prevent foster care placement in an individual case at the initial "shelter care hearing." This hearing must be held, pursuant to Ill. Rev. Stat. ch. 37, § 802-10, within 48 hours of any removal of a child from his home by an authorized person. The Juvenile Court Act provides specifically that:

> [t]he Court shall require documentation by representatives of the Department of Children and Family Services or the probation department as to the *reasonable efforts* that were made to prevent or eliminate the necessity of removal of the minor from his or her home, and shall consider the testimony of any person as to those *reasonable efforts*. If the court finds that it is a matter of immediate and urgent necessity . . . that the minor be placed in a shelter care facility and further finds that *reasonable efforts* have been made or good cause has been shown why *reasonable efforts* cannot prevent or eliminate the necessity of removal of the minor from his or her home, the court may prescribe shelter care. . . .

Ill. Rev. Stat. ch. 37, § 802-10 (1987) (emphasis added).

DCFS' systemic failure to assign caseworkers to children promptly after the children are removed from their own homes—the failure that this case was brought to correct—makes it *impossible* for a state court judge faithfully to discharge his or her doubly-mandated responsibility under Section 672(a)(1) and Ill. Rev. Stat. ch. 37, § 802-10.

Illinois relies on caseworkers to provide reasonable efforts. Op. Cert. App. 13 (Finding Nos. 9, 11). It also relies on those same assigned caseworkers to testify in juvenile court about the child's needs, the services that have been provided and the efforts that could be made to prevent placement or reunite the family. Ill. Rev. Stat. ch. 37,

§ 802-10; *DCFS Rules and Procedures Manual* at App. E-P305 (1) (Oct. 1, 1986). When no caseworker is assigned at the time of the shelter care hearing to provide reasonable efforts, *no* services at all can be provided, and the juvenile court can receive no informed testimony about the efforts that have been made. This compromises the juvenile court's ability to safeguard against unnecessary foster care placement. With no caseworker present in court, the juvenile court is unable to determine what alternative services might be successful in preventing the need to remove the child, and whether any "reasonable efforts" have been or could be made to prevent placement or reunite the family.

Following the shelter care hearing, the juvenile court waits for weeks, often months, until an assigned caseworker with knowledge about the child's needs appears to testify in court. Under the Illinois Juvenile Court Act, however, the subsequent adjudicatory hearing, to be held one hundred and twenty days after the shelter care hearing, Ill. Rev. Stat. ch. 37, § 802-14, does not explicitly require a "reasonable efforts" determination (even though this subsequent hearing may present the first opportunity for more informed review of whether "reasonable efforts" have ever been made). When several months have elapsed following the shelter care hearing before an assigned caseworker testifies in court, the juvenile court has lost the ability to provide the intended safeguard against unnecessary foster care.

Because DCFS has failed to put "into effect" a "state plan" that provides for "reasonable [foster care prevention] efforts," the Illinois juvenile courts are presented, at the initial shelter care hearing, with a choice between two alternatives, neither of which is consonant with the goals Congress sought to achieve under the AACWA.

First, the state court may return a child home, even though doing so may leave the child at risk of continuing harm. Alternatively, the court may place the child in foster care, even though the child would be better off with parents and siblings if the state made "reasonable efforts" to keep the family together.

The CBA Special Juvenile Justice Committee noted the dilemma the Illinois state juvenile courts face as follows:

> [L]ittle inquiry is made regarding reasonable efforts before cases are filed and children are removed from their parents. . . . The judges are placed in a 'catch-22' when they are told that a child is in danger and DCFS does not have the services needed to leave the child at home safely. The judge faces the choice of allowing the child to return home without the protective services guaranteed by law or removing the child even though adequate services would obviate the need for removal.

CBA Report at 12-13.

DCFS' failure to make reasonable efforts promptly after securing custody of children has serious consequences for children later in need of adoption. In several reported decisions, DCFS' failure to make efforts to preserve families has been held later to bar termination of parental rights (a prerequisite for adoption). *See, e.g., Paul v. Steele*, 101 Ill. 2d 345, 461 N.E.2d 983 (1983) (termination of parental rights reversed because DCFS had discouraged or frustrated promotion of the parent-child relationship); *In Interest of Wheat*, 68 Ill. App. 3d 471, 386 N.E. 2d 278 (1st Dist. 1979); *Taylor v. Taylor*, 30 Ill. App. 3d 906, 334 N.E.2d 194 (1st Dist. 1975); *In re Overton*, 21 Ill. App. 3d 1014, 316 N.E.2d 201 (2d Dist. 1974). As a result, many children in Illinois remain in long-term foster care because the state's attorney (who would otherwise

file a petition to terminate parental rights), the court, or the current DCFS worker concludes that DCFS has not adequately tried to help reunite the family. *DCFS Rules and Procedures Manual* § C-R 302.300 (1987). The state may then operate under a delayed directive to work toward family reunification, and, as a result, cases of children in limbo, torn between attachment to natural parents and foster parents, like Ashley K., come to be commonplace.

IV.

NEITHER THE ILLINOIS STATE COURTS NOR THE SECRETARY OF HHS IS CAPABLE OF SECURING THE CHILDREN'S RIGHT UNDER THE AACWA TO A STATE PLAN UNDER WHICH DCFS WILL MAKE "REASONABLE EFFORTS" TO PREVENT FOSTER CARE PLACEMENT AND ENABLE CHILDREN TO RETURN HOME.

Not only is Illinois unable to provide effective judicial safeguards against unnecessary foster care placements unless Illinois first complies with Sections 671(a)(3) and (15), but Illinois law does not confer upon the Illinois state juvenile courts a means of remedying DCFS' "reasonable efforts" default.

Juvenile courts cannot simply dismiss the state's petitions for custody of children and return children home, despite lack of reasonable efforts, because the interests of children often preclude returning them home to parents who may, without foster care prevention or reunification efforts, continue to neglect or abuse them. *See, e.g, In re J.J.*, 142 Ill. 2d 1, 566 N.E.2d 1345 (1991).[9] The Illinois

[9] Illinois law requires placement decisions following findings of parental abuse or neglect be made consistently with the "best interests" of the child. *See In Re Ashley K.*, 212 Ill. App. 3d 849,

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Juvenile Court Act also limits the authority of juvenile court judges to order state executive agencies to amend their policies or practices. *See In re Washington*, 65 Ill. 2d 391, 359 N.E.2d 133 (1976) (injunctions against solitary confinement practice of Department of Corrections and directing establishment of guidelines for discipline methods is unauthorized as beyond the scope of the Juvenile Court Act); *In re Petition of Owen*, 54 Ill. 2d 104, 295 N.E.2d 455 (1973) (same). Furthermore, an individual juvenile court judge sitting in an individual proceeding cannot provide relief to other children not before the court. *See Lyons v. Illinois Dept. of Revenue*, 116 Ill. App. 3d 1072, 452 N.E. 2d 830 (1st Dist. 1983). Thus, an Illinois juvenile court judge, in an individual case in which a child has been taken from his family even though minimal "reasonable efforts" might have kept the family together, cannot order DCFS to make systemic changes in either its state IV-E plan or its manner of implementing that plan. In short, the juvenile court cannot, in such a case, direct the type of systemic relief that would secure the right to have "in effect" the lawful plan mandated by Sections 671(a)(3) and (15).

Nor, contrary to the view of the United States, is the Secretary of HHS capable of securing this right by "fed-

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[9] *continued*

571 N.E.2d 905 (1st Dist. 1991). Contrary to the Petitioners' suggestion, Pet. Br. pp. 21-26, however, there is no inconsistency between this standard and the companion statutory policy that favors keeping children in their own homes and returning them to their homes if they have been placed in foster care. *See* Ill. Rev. Stat. ch. 37 § 801-2(3); *see, e.g., In re Polovchak*, 97 Ill. 2d 212, 454 N.E. 2d 258 (1983). *See also In re Custody of Townsend*, 86 Ill. 2d 502, 427 N.E.2d 1231 (1981) (parental rights . . . "are fundamental and as ancient as mankind"). The latter policy is to be pursued so long as doing so is consistent with the child's "best interests."

eral administrative[ ] enforce[ment]." *See* U.S. Br. at 17 and n. 7. The size, scope and complexity of the public assistance programs the Secretary is charged with overseeing nationally—the AFDC, Medicaid and Supplemental Security Income programs among them—simply defeat any notion that he can possibly police effectively DCFS' compliance with one small, if very important, corner of its Title IV-E program.

Indeed, to the extent that HHS takes it upon itself to review compliance with Sections 671(a)(3) and (15) at all, the federal regulations anticipate only the most limited sort of "paper review," with no attention paid to what the state agency is actually doing. *See* 45 C.F.R. §§ 1356.21(b), (d)(4), 1357.15(e) (1990); United States Dep't of Health and Human Serv., *Policy Announcement* ACYF-PA-84-1 (1984). As the American Bar Association explains more fully in its amicus brief, HHS does not, in any event, qualitatively review whether state child welfare agencies are actually making the "reasonable" foster care prevention and family reunification efforts mandated by 42 U.S.C. § 671(a)(15). ABA Br. at § III.[10]

The Secretary's ability to secure compliance with the "reasonable efforts" requirement of Sections 671(a)(3) and (15), even if it were to conduct a qualitative review and find the state in default, is doubtful. This is because, as

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[10] In Illinois, HHS has not conducted any such reviews notwithstanding the evidence in this case that the state's IV-E plan systemically fails to provide "reasonable efforts" to many children eligible for them, and the evidence in *Norman* and in the independent study reports that "reasonable efforts" findings by state court judges under Ill. Rev. Stat. ch. 37 § 802-10 and 42 U.S.C. § 672(a)(1) are being made "pro-forma," without any actual inquiry into whether such efforts in fact are being made. *Norman*, 739 F. Supp. at 1203.

the United States acknowledges, U.S. Br. at 17, the Secretary has only one crude weapon to enforce these provisions: withholding federal funds under the IV-E program. 42 U.S.C. § 671(b). Use of this sanction would penalize the beneficiaries of the foster care program, without bringing about any programmatic change, and it is therefore understandable why the Secretary has been loathe to invoke it. Indeed, to Amici's knowledge, neither the Secretary nor his predecessors have ever terminated federal funding (other than "incentive payments") to a state-administered public assistance program under *any* portion of the Social Security Act, notwithstanding countless judicial findings of substantial state violations in the administration of these programs. To the contrary, the Secretary has routinely approved state plans later found to be out-of-compliance with that Act. *See e.g. Townsend v. Swank*, 404 U.S. 282, 286-88 (1972).

CONCLUSION

Illinois has failed to put in effect a state plan providing for reasonable efforts to prevent removal of children or enable children to return home, in violation of Sections 671(a)(3) and (15). That failure has resulted in a foster care system in Illinois very much like the one Congress sought to eliminate when it enacted AACWA: a system in which children drift from one temporary foster care placement to another, when minimal "reasonable efforts" would have enabled them to remain at home or to return home. The same failure has frustrated the Illinois state courts' efforts to adhere to *their* obligations under Section 672(a)(1) and state law—obligations that are entirely distinct from the obligation of DCFS under Sections 671(a)(3) and (15). Neither the Illinois state courts nor the Secretary is, in any event, capable of ensuring DCFS' compliance with

the "reasonable efforts" mandate of Sections 671(a)(3) and (15). Judicial enforcement under Section 1983 provides the only effective remedy against the unnecessary—and traumatic—placement of children in foster care that routinely occurs in the absence of a lawful state IV-E plan for "reasonable efforts" that is "in effect". This Court should affirm the court of appeals' judgment.

Respectfully submitted,

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